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Tung Kean Hin & Anor (as executor for the estate of Tung Leong Geok, deceased) v Yuen Heng Phong (as administrator for the estate of See Ngan Sang @ Lee Ngan Sang)

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02(NCVC)(W)-1097–06 OF 2017
ZAWAWI SALLEH, VERNON ONG AND HASNAH HASHIM JJCA
27 NOVEMBER 2018

C

Civil Procedure — Action — Accrual of — Whether plaintiff's claim barred under Limitation Act 1953 and by laches — Plaintiff sued for recovery of land she claimed was transferred to another person using forged document — Plaintiff aware of alleged fraud/forgery for more than 50 years before filing action for recovery and lodging private caveat on the land — Whether plaintiff guilty of inordinate unexplained delay and acquiescence and 'sleeping on her rights' — Whether plaintiff's failure to particularise allegation of fraud in her pleadings was fatal — Whether allegation of forgery unproven as evidence did not establish whether specimen signatures given to handwriting expert for analysis were actually made by plaintiff — Whether evidence did not support existence of any constructive trust nor application of doctrine of res judicata

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The appellants were the executors of the estate of Tung Leong Geok ('the deceased') while the respondent was the son-cum-administrator of the estate of his mother, See Ngan Sang @ Lee Ngan Sang ('SNS'), who died during the course of the trial in the High Court. SNS had sued the deceased to recover her land with building ('the property') which she claimed was fraudulently transferred to the deceased pursuant to an indenture executed in 1962 in which her signature was allegedly forged. SNS claimed that when she demanded for the return of the property, she was told to pay the deceased a total sum of RM5,000 by way of monthly instalments of RM130. SNS claimed that despite paying that monthly instalment from 1962–1979 (totaling RM25,000) the property was never returned to her. 52 years after the date of the said indenture, SNS sued the deceased in the High Court for, inter alia, an order that the property be transferred back to her upon declarations that the transfer of the property to the deceased was null and void and that he held the property on trust for her. In response, the appellants pleaded that SNS's claim was barred by limitation and laches. They counterclaimed for, inter alia, the removal of SNS's private caveat on the land and for damages flowing from the wrongful entry of the caveat. The appellants also relied upon the doctrine of res judicata saying that in a suit filed in 1985 by the deceased against SNS for arrears of rental and vacant possession, the sessions court had decided that the deceased owned the

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property and that SNS should deliver up vacant possession of the property to the deceased. After a full trial, the High Court decided in SNS's favour and dismissed the counterclaim holding that, inter alia, the handwriting expert witness ('SP1') had proven that SNS's signature on the indenture was a forgery; that the title acquired by the deceased was therefore defeasible under s 340(2) of the National Land Code; that the deceased held the property as constructive trustee for SNS; that laches could not defeat a claim premised upon forgery and that the appellants could not rely upon the doctrine of res judicata. The instant appeal against the High Court's decision concerned four issues: (i) whether SNS's claim was barred by the Limitation Act 1953 and/or by laches; (ii) whether fraud/forgery had been proven; (iii) whether SP1's evidence was sufficient to establish forgery; and (iv) whether the plea of res judicata was available to the appellants.

Held, allowing the appeal, setting aside the High Court's decision and ordering SNS's private caveat on the property to be removed:

(1) There was overwhelming evidence to show that SNS's claim, by reason of inordinate delay and by her own conduct, was barred by laches. There was no affirmative act on the part of the appellants to deceive or lull SNS from taking any action or making inquiries into the facts relevant to her right to bring an action. SNS had slept on her rights and acquiesced for more than 50 years. On the facts and evidence, SNS was aware of the transfer of the property to the deceased: (a) in 1967, when she asked him to transfer the property to her after she had made the payments for five years; (b) in 1978, when her solicitors wrote to the deceased on the issue of the transfer of the land to her; (c) in 1985, when the civil suit was commenced against her for arrears of rental; and (d) in 1998, when she lodged a police report over the fraudulent transfer of the property to the deceased. In addition, SP2 in his statutory declaration affirmed that SNS was fully aware since 1962 that she was 'tricked' by the deceased. And in his witness statement, SP2 stated that SNS was informed by a friend in December 1962 that the property had been sold. However, SNS continued paying the RM130 per month until 1979. No reason was given for her decision to commence her action against the deceased only in 2014 (see paras 28, 39 & 42).

(2) For recovery of property in the context of ss 9(1) and 10(1) of the Limitation Act 1953 ('the LA'), the pertinent question was the date when the right of action accrued to SNS. SP2 stated that SNS knew of the transfer way back in 1962 but only lodged a police report about it in 1998. No explanation was given for the delay in lodging the police report or the private caveat. SNS filed her action more than 12 years after the date on which the right of action accrued to her. Even if the action was based on fraud, under s 29 of the LA the limitation period would begin to run when a plaintiff had discovered the fraud or could, with reasonable

diligence, have discovered it. Based on SP2's statutory declaration and witness statement, SNS had knowledge of the transfer way back in 1962, more than 50 years ago. Her failure to commence any action upon discovery of the purported fraud rendered her claim statute-barred under the LA (see paras 29–33).

(3) Particulars of fraud must not only be pleaded but specifically pleaded so that the other party would not be taken by surprise and would know precisely the accusation against him. A general allegation of fraud was insufficient to mount the averment of fraud. Paragraph 28 of the respondent's statement of claim was clearly insufficient for the purpose of pleading forgery and/or fraud. The non-particularisation of the allegation of fraud was clearly fatal to the respondent's case (see paras 48–49).

(4) In the absence of verification of the authorship of the specimen signatures, the expert evidence of SP1 and the findings of the trial judge on that issue were seriously flawed as they were indefensible and unsupported by the facts of the case. The trial judge failed to determine whether SNS had authored the specimen signatures that were provided to SP1 for his examination. There was no cogent evidence to show the specimen signatures were in fact made by SNS. She died in 2015 before giving evidence. SP2 testified that the specimen signatures belonged to SNS and that she had made those signatures before a lawyer. However, that lawyer was never called to testify to support SP2's contention. The respondent's approach to establishing the forgery was a methodology that was totally unacceptable and misguided (see paras 61 & 64–66).

(5) The evidence showed that SNS had paid RM130 to the deceased as monthly rental and receipts for the monthly rentals were issued to her by the deceased. No evidence was adduced that the said payments were for the purchase of the property. There was no evidence of any oral or written agreement between SNS and the deceased that the deceased would return the property to her. On the facts and the evidence, and in the absence of any proof of forgery, the trial judge erred in imputing or imposing a constructive trust (see paras 73–74).

(6) Res judicata did not apply in the instant case. The sessions court had only decided on arrears of rental and vacant possession whilst the High Court, in the appellants' striking out application, had decided whether the claim was on the face of it obviously unsustainable and it ruled that there was a cause of action which should proceed to full trial. No previous decision was made on the issues of forgery and limitation/laches (see para 77).

[Bahasa Malaysia summary

Perayu-perayu adalah pelaksana harta pusaka Tung Leong Geok ('si mati') manakala responden adalah anak lelaki dan pentadbir harta pusaka ibunya, See

Ngan Sang @ Lee Ngan Sang ('SNS'), yang meninggal semasa perbicaraan di Mahkamah Tinggi. SNS telah menyaman si mati untuk mengambil kembali tanah dengan bangunan ('harta') yang didakwa dipindahmilik secara fraud kepada si mati menurut indentur yang dilaksanakan pada tahun 1962 di mana tandatangannya didakwa palsu. SNS mendakwa bahawa apabila beliau menuntut kembalinya harta itu, beliau diberitahu untuk membayar si mati sejumlah RM5,000 dengan ansuran bulanan sebanyak RM130. SNS mendakwa bahawa walaupun membayar ansuran bulanan dari 1962–1979 (berjumlah RM25,000) harta itu tidak pernah dikembalikan kepadanya. 52 tahun selepas tarikh indenture tersebut, SNS menyaman si mati di Mahkamah Tinggi untuk, antara lain, satu perintah bahawa harta itu dipindahkan balik kepadanya atas deklarasi bahawa pemindahan harta itu kepada si mati adalah batal dan tidak sah dan bahawa si mati memegang harta itu atas amanah untuk beliau. Sebagai jawapan, perayu memplid bahawa tuntutan SNS telah dihalang oleh keterbatasan dan *laches*. Mereka menuntut balas, antara lain, penyingkiran kaveat persendirian SNS di atas tanah dan ganti rugi yang berlangsung dari kemasukan kaveat yang salah. Perayu-perayu juga bergantung pada doktrin res judicata yang mengatakan bahawa dalam saman yang difailkan pada tahun 1985 oleh si mati terhadap SNS untuk tunggakan sewa dan pemilikan kosong, mahkamah sesyen memutuskan bahawa si mati memiliki harta itu dan SNS harus menyerahkan pemilikan kosong harta itu kepada si mati. Selepas perbicaraan penuh, Mahkamah Tinggi membuat keputusan memihak kepada SNS dan menolak tuntutan balas memutuskan bahawa, antara lain, saksi pakar tulisan tangan ('SP1') membuktikan bahawa tandatangan SNS pada indentur adalah palsu; bahawa hakmilik yang diperoleh oleh si mati dengan itu boleh disangkal di bawah s 340(2) Kanun Tanah Negara; bahawa si mati memegang harta sebagai pemegang amanah konstruktif untuk SNS; bahawa laches tidak boleh mengalahkan tuntutan yang didasarkan atas pemalsuan dan bahawa perayu tidak boleh bergantung kepada doktrin res judicata. Rayuan ini terhadap keputusan Mahkamah Tinggi adalah berkenaan empat isu: (i) sama ada tuntutan SNS telah dihalang oleh Akta Had Masa 1953 dan/atau *laches*; (ii) sama ada fraud/pemalsuan telah terbukti; (iii) sama ada keterangan SP1 mencukupi untuk mewujudkan pemalsuan; dan (iv) sama ada rayuan res judicata tersedia kepada perayu.

Diputuskan, membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi dan memerintahkan kaveat persendirian SNS ke atas harta tersebut dibatalkan:

(1) Terdapat keterangan yang banyak untuk menunjukkan bahawa dakwaan SNS, disebabkan oleh kelewatan yang sangat besar dan kelakuannya sendiri, telah dihalang oleh laches. Tiada tindakan afirmatif di pihak perayu untuk menipu atau melalaikan SNS daripada mengambil sebarang tindakan atau membuat pertanyaan ke fakta-fakta yang berkaitan dengan haknya untuk membawa tindakan. SNS telah

membiarkan haknya dan bersetuju untuk lebih daripada 50 tahun. Mengenai fakta dan keterangan, SNS menyedari pemindahan harta itu kepada si mati: (a) pada tahun 1967, apabila beliau memintanya untuk memindahkan harta itu kepadanya selepas beliau membuat pembayaran selama lima tahun; (b) pada tahun 1978, apabila peguamnya menulis kepada si mati mengenai isu pemindahan tanah kepadanya; (c) pada tahun 1985, apabila saman sivil dimulakan terhadapnya untuk tunggakan sewa; dan (d) pada tahun 1998, apabila beliau membuat laporan polis berhubung pemindahan harta yang dikatakan secara fraud kepada si mati. Di samping itu, SP2 dalam akuan berkanunnya menegaskan bahawa SNS telah sedar sejak tahun 1962 bahawa beliau telah 'ditipu' oleh si mati. Dan dalam kenyataan saksinya, SP2 menyatakan bahawa SNS telah dimaklumkan oleh seorang rakan pada Disember 1962 bahawa harta tersebut telah dijual. Walau bagaimanapun, SNS terus membayar RM130 sebulan sehingga tahun 1979. Tiada alasan diberi untuk keputusannya memulakan tindakannya terhadap si mati hanya pada tahun 2014 (lihat perenggan 28, 39 & 42).

(2) Bagi pengambilan harta dalam konteks ss 9(1) dan 10(1) Akta Had Masa 1953 ('Akta'), persoalan penting adalah tarikh apabila hak tindakan terakru kepada SNS. SP2 menyatakan bahawa SNS tahu tentang pemindahan pada tahun 1962 tetapi hanya membuat laporan polis mengenainya pada tahun 1998. Tiada penjelasan yang diberikan untuk kelewatan dalam membuat laporan polis atau kaveat persendirian. SNS memfailkan tindakannya lebih daripada 12 tahun selepas tarikh hak tindakannya terakru kepadanya. Sekalipun tindakan itu berdasarkan fraud, di bawah s 29 Akta tempoh had masa akan mula berjalan apabila plaintif telah menemui fraud itu atau boleh, dengan usaha yang sewajarnya, telah menemuinya. Berdasarkan akuan berkanun SP2 dan pernyataan saksi, SNS mempunyai pengetahuan mengenai pemindahan pada tahun 1962, lebih daripada 50 tahun yang lalu. Kegagalannya untuk memulakan apa-apa tindakan setelah penemuan fraud yang dikatakan membuatkan tuntutannya dihalang statut di bawah Akta (lihat perenggan 29–33).

(3) Butir-butir fraud bukan sahaja perlu diplid tetapi secara khusus diplid supaya pihak satu lagi tidak akan terkejut dan akan mengetahui secara tepat tuduhan terhadapnya. Tuduhan fraud umum tidak mencukupi untuk menimbulkan penegasan fraud. Perenggan 28 pernyataan tuntutan responden jelas tidak mencukupi untuk tujuan memplid pemalsuan dan/atau fraud. Ketiadaan perincian tuduhan fraud jelas adalah fatal kepada kes responden (lihat perenggan 48–49).

(4) Dalam ketiadaan pengesahan penulisan tandatangan spesimen, keterangan pakar SP1 dan penemuan hakim perbicaraan mengenai isu itu telah mengalami kecacatan yang serius kerana mereka tidak dapat

dipertahankan dan tidak disokong oleh fakta kes itu. Hakim perbicaraan gagal menentukan sama ada SNS telah menulis tandatangan spesimen yang diberikan kepada SP1 untuk pemeriksaannya. Tiada bukti yang jelas untuk menunjukkan tandatangan spesimen sebenarnya dibuat oleh SNS. Beliau meninggal dunia pada tahun 2015 sebelum memberi keterangan. SP2 memberi keterangan bahawa tandatangan spesimen adalah milik SNS dan beliau telah membuat tandatangan tersebut di hadapan seorang peguam. Walau bagaimanapun, peguam itu tidak pernah dipanggil untuk memberi keterangan untuk menyokong pandangan SP2. Pendekatan responden untuk membuktikan pemalsuan adalah satu metodologi yang tidak dapat diterima dan salah (lihat perenggan 61 & 64–66).

(5) Keterangan menunjukkan bahawa SNS telah membayar RM130 kepada si mati sebagai sewa bulanan dan resit untuk sewa bulanan dikeluarkan kepadanya oleh si mati. Tiada keterangan telah dibuat bahawa bayaran tersebut adalah untuk pembelian harta itu. Tiada keterangan mengenai apa-apa perjanjian lisan atau bertulis antara SNS dan si mati bahawa si mati akan mengembalikan harta itu kepadanya. Mengenai fakta dan keterangan, dan dalam ketiadaan sebarang bukti pemalsuan, hakim perbicaraan terkhilaf dalam menganggap atau mengenakan kepercayaan konstruktif (lihat perenggan 73–74).

(6) Res judicata tidak terpakai dalam kes ini. Mahkamah sesyen hanya membuat keputusan mengenai tunggakan sewa dan milikan kosong sementara Mahkamah Tinggi, dalam permohonan mengetepikan oleh perayu, telah memutuskan sama ada tuntutan itu kelihatan secara jelas tidak dapat dipertahankan dan ia memutuskan bahawa terdapat kausa tindakan yang perlu diteruskan ke perbicaraan penuh. Tiada keputusan terdahulu dibuat mengenai masalah pemalsuan dan pembatasan/*laches* (lihat perenggan 77).]

Notes

For a case on accrual of action, see 2(1) *Mallal's Digest* (5th Ed, 2017 Reissue) para 51.

Cases referred to

Abdul Manaf bin Ahmad v Mohd Kamil Datuk Haji Mohd Kassim [2011] 4 MLJ 346; [2009] 2 CLJ 121, CA (folld)

Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor [1989] 2 MLJ 202; [1989] 1 CLJ 693, HC (refd)

Archibald v Scully [1861] IX HLC 360 (refd)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189; [1995] 3 CLJ 783, SC (folld)

Associated Leisure Ltd (Phonographic Equipment Ltd) v Associated Newspapers Ltd [1970] 2 QB 450, CA (refd)

Cheah Kim Tong & Anor v Taro Kaur [1989] 3 MLJ 252; [1989] 1 CLJ Rep 378; [1989] 2 CLJ 791, HC (refd)
Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai [1997] 3 MLJ 61; [1997] 2 CLJ 153, FC (refd)
Foo Holdings Sdn Bhd & Anor v Foo Choon Ying @ Foo Chun Yin (executor for the estate of Chen Choi Thai,the deceased) [2013] MLJU 1638; [2013] 1 LNS 908, HC (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)
Guan Teik Sdn Bhd v Haji Mohd Noor bin Haji Yakob & Ors [2000] 4 MLJ 433; [2000] 4 CLJ 324, CA (refd)
Henderson v Henderson (1843) 3 Hare 100 (folld)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)
Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd [2017] 4 MLJ 697; [2017] 5 CLJ 418, FC (refd)
Lindsay Petroleum Co Hurd (1874) LR 5 PC 221 (refd)
Majuikan Sdn Bhd v Barclays Bank Plc [2015] 1 MLJ 171; [2014] 9 CLJ 337, CA (refd)
Malaysian Assurance Alliance Bhd v Anthony Kulanthai Marie Joseph (suing as a representative of the estate of Martin Raj a/l Anthony Selvaraj, deceased) [2010] 4 MLJ 749; [2011] 1 CLJ 15, FC (refd)
Murari Lal s/o Ram Singh v State of Madhya Pradesh 1980 AIR 531, SC (refd)
Paragon Finance plc v D B Thakerar & Co (a firm) [1999] 1 ALL ER 400, CA (refd)
PP v Mohamed Kassim bin Yatim [1977] 1 MLJ 64 (refd)
Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751; [2010] 1 CLJ 381, FC (refd)
United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd [1993] 1 MLJ 182; [1993] 2 CLJ 31, SC (refd)
Wallingford v Mutual Society (1880) 5 App Cas 685, HL (refd)
Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1996] AC 669, HL (refd)
Wong Yew Kwan v Wong Yu Ke & Anor [2009] 2 MLJ 672; [2010] 2 CLJ 703, CA (refd)
Zung Zang Wood Products Sdn Bhd & Ors v Kwan Chee Hang Sdn Bhd & Ors [2014] 2 MLJ 799, FC (refd)

Legislation referred to

Evidence Act 1950 s 73,
Limitation Act 1953 ss 9(1), 10(1), 22, 29
National Land Code ss 340, 340(2), Form 19B

Appeal from: Civil Suit No 22NCVC-147–10 of 2014 (High Court, Pulau Pinang)

Tan Swee Cheng (Stephen Chua with him) (Wong & Loh) for the appellants.
Lee Khai (Teh Chiew Yin with him) (Ong and Maneksha) for the responden.

Hasnah Hashim JCA (delivering judgment of the court):

[1] This is an appeal by the appellant against the decision of the High Court dated 4 May 2017, which allowed the plaintiff's claim and dismissed the counterclaim by the defendants with costs of RM18,000.

[2] We had on 11 April 2018, after perusing the records of appeal and hearing submissions from learned counsel for the appellants ('the defendants') as well as the respondent ('the plaintiff'), unanimously allowed the appeal. We set out below our reasons.

[3] For ease of reference, in this judgment, the parties will be referred to as they were in the High Court.

BACKGROUND FACTS

[4] See Ngan Sang @ Lee Ngan Sang's ('the plaintiff') case against the defendants is for the return of a piece of land described as Lot 356 Mukim 16, Daerah Timur Laut, Pulau Pinang together with premises erected thereon bearing the address No 613-E, Jalan Pasar, Air Itam, Pulau Pinang ('the property'). The plaintiff sued the defendants in their capacity as the executors of the estate of Tung Lung Geok ('the deceased'). The plaintiff passed away in the midst of the trial in the High Court. After the plaintiff's demise, this action was continued by her son as the administrator of her estate.

[5] This case has a long history. Fifty-nine years ago in 1959, the plaintiff purchased the property from one Chan Yeok Ngoh for the sum of RM9,500. Sometime in 1960, the plaintiff applied for a license to build a soy sauce factory on the property and engaged the services of an architect, one Zainal Abidin, to draw up a building plan of the soy sauce factory. The plaintiff mortgaged the property to Overseas Chinese Banking Corp Ltd ('OCBC') as security for an overdraft facility of RM5,000 to finance her soy sauce business.

[6] The plaintiff then entered into a joint venture agreement to build the soy sauce factory with Tung Twa Buck, the deceased's father, who was a close friend of the plaintiff. Tung Twa Buck suggested that his eldest son, the deceased, be appointed as the director of the soy sauce business. As the plaintiff trusted the deceased, she handed over the documents including the title deed of

the property to the deceased. On 3 August 1962, the deceased requested the plaintiff to go to the office of his solicitors to execute the joint venture agreement. The documents were all in English and according to the plaintiff the contents of the documents were never explained to her. However, she was told not to worry as the documents were in relation to the joint venture agreement. On the assurances of the deceased and his solicitor, the plaintiff signed all the documents. The deceased then took her to OCBC and deposited RM5,000 into her account which she thought was for the soy sauce business. The plaintiff was shocked when she was notified by one Lim Tuck Seng that she had in fact sold the property to the deceased and his business partner, one Tang Theam Seng ('Tang').

[7] By an indenture dated 3 August 1962 ('the indenture'), the property was purportedly sold and transferred to the deceased and Tang. Subsequently, Tang transferred his 3/14 share of the property to the deceased on 1 July 1963, making the deceased the sole owner of the property. The plaintiff alleged that she had gone to the defendant's solicitors' office and was told that if she wants the property to be returned to her, she must make a monthly payment of RM130 until the sum of RM5,000 is fully paid. As her husband was unwell and the fear of the possibility that her family may be evicted from the property, she paid the RM130 per month as agreed to the deceased from 1962–1979. Even after diligently paying every month to the deceased there was no attempts at all to transfer and return the property to her as promised. She subsequently realised she had paid more than the agreed sum of RM5,000. She had in fact paid the sum of RM25,000 to the deceased.

[8] It is the plaintiff's pleaded case that she had no intention to sell the property and that the property was fraudulently transferred by the deceased as her signature on the indenture was forged. It is contended by the plaintiff that since the property was fraudulently transferred, the said transfer is therefore defeasible pursuant to s 340(2) of the National Land Code ('the NLC'). Thus, by operation of law, the deceased is a constructive trustee holding the property on trust for her.

[9] Sometime in 2007, the plaintiff on the advice of the Bar Council Legal Aid Centre conducted a search at the land office and to her horror discovered that her signature on the indenture was forged. She lodged a police report immediately and in 2013 lodged a private caveat.

[10] The defendants, on the hand, pleaded that the plaintiff's claim is barred by limitation and laches as the plaintiff commenced this suit more than 50 years after the execution of the indenture. Furthermore, it is contended that the plaintiff's claim is res judicata as the matter has already been heard and decided in the Penang Sessions Court in Civil Suit No 62–1283–85.

[11] The plaintiff's claims against the defendants as summarised by the learned judicial commissioner in his grounds of judgment are as follows:

(a) a declaration that the signature on the indenture is the forged signature of the plaintiff;

(b) a declaration that the indenture is null and void ab initio as it contains not only the plaintiff's forged signature, but also 'a false' vendor, that is one Lee Ngan Sang @ See Ngan Sang;

(c) a declaration that the defendants hold the property on trust for the plaintiff;

(d) a declaration that the transfer of the property to Tung Leong Geok is null and void;

(e) an order that the Registrar of Titles and all other authorities are required to carry out all necessary measures to ensure that the property is transferred back to the plaintiff's name, See Ngan Sang @ Lee Ngan, or to the personal representative or administrator of the estate of See Ngan Sang @ Lee Ngan Sang;

(f) an order that the defendants return to the plaintiff a sum of RM20,000 for the over payment made by the plaintiff;

(g) damages to be assessed and paid to the plaintiff for the difficulties, sufferings and expenses incurred as a result of the illegal transfer to Lot 356 and the false allegations;

(h) interest at the rate of 5%pa from the date of filing until full settlement;

(i) costs; and

(j) any other further reliefs.

[12] The defendants' counterclaim are as follows:

(a) an order that the private caveat No 0799B2013002015 lodged by the plaintiff be removed and/or set aside with immediate effect;

(b) further, an order that the plaintiff is prohibited from filing any/or further caveat on Lot 356;

(c) damages to be assessed for the wrongful entry of private caveat;

(d) interest on damages at 5%pa calculated on a daily rate basis form the date of filing of the counterclaim until full settlement;

(e) costs; and

(f) any other further reliefs.

[13] On 16 January 2015, the defendants filed an application to strike out the plaintiff's claim. The application was dismissed by the High Court. On appeal, the Court of Appeal dismissed the appeal and affirmed the High Court's decision. The matter was then set down for trial.

THE HIGH COURT DECISION

[14] Briefly, after full trial, the learned trial judge found, inter alia, as follows:

(a) the learned judicial commissioner accepted the expert evidence of the plaintiff's expert ('SP1') and concluded that the signatures of the plaintiff on the indenture was forged;

(b) that laches cannot be considered in a claim premised on forgery;

(c) that the court is entitled to refer to the notes of evidence of the trial in the sessions court and concluded that based on the notes of evidence the deceased claimed to have rented the property to the plaintiff after the sale of the said property sometime in 1962. However, due to the inconsistent and conflicting evidence adduced by the parties in the sessions court suit, little weight was attached to the evidence in respect of that suit;

(d) the deceased is the constructive trustee of the plaintiff when he became the registered owner of the property;

(e) the plaintiff had proved forgery of the indenture and the title acquired by the deceased is defeasible under s 340(2) of the NLC; and

(f) the defendant is estopped form raising res judicata as the learned judicial commissioner who dismissed the striking out application had made specific findings during the interlocutory application.

THE GROUNDS OF APPEAL

[15] In their memorandum of appeal, the defendants raised, inter alia, the following grounds in impugning the learned judicial commissioner's decision:

(a) whether the defendants are barred from raising res judicata and limitation in their defence as the defendants failed in the striking out application;

(b) whether the plaintiff's claim is time barred pursuant to the Limitation Act 1953 and/or laches;

(c) the learned trial judge failed to address the issue of pleading of fraud and/or forgery. No particulars of fraud and/or forgery were pleaded in the pleadings; and

(d) the learned judge erred in law and in fact in holding that the signature is a forged signature when the expert SP1 had admitted that he had prepared the report based on the documents given to him and not on specimen signature.

OUR CONSIDERATION AND DECISION

[16] We are mindful of the limited role of the appellate court in relation to findings of facts made by the court of first instance. The general principle is that the conclusion of a trial judge is a finding of fact on the oral evidence based on the demeanour and credibility of the witnesses before him or her. Generally, such finding ought not be disturbed unless the appellate court is convinced that it is plainly wrong. It would not be sufficient to warrant any interference merely because the appellate court entertains doubt whether such finding is right (see: *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19, *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309).

[17] The appellate court must be slow to interfere with the findings made by the trial court unless if it be shown that there was no judicial appreciation of the evidence adduced before it.

[18] Having set out the legal principles underlying appellate intervention, we now turn to the facts of the present case.

[19] It is against the historical background we mentioned above that the plaintiffs' case must be viewed, and the plaintiff's case is this. She had signed the joint venture agreement in 1962. She was then told by the defendants' solicitors that if she wants the property to be returned to her she must make monthly payment of RM130 to the deceased until the sum of RM5,000 is fully paid. This she did, but the property was never transferred or returned to her. It is the plaintiff's contention that the deceased acquired the ownership of the property fraudulently as her signature on the indenture was forged.

Civil Suit No 62–1285 of 1985

[20] In 1985, the deceased filed a suit against the plaintiff in the sessions court for arrears of rental and vacant possession. The full trial commenced in 1992 and completed in 1998. After a full trial, the sessions court having found that the deceased is the owner of the property, allowed the claim for vacant possession.

Limitation

[21] Learned counsel for the defendants submitted that the plaintiff's claim is time barred under the Limitation Act 1953 and/or laches. The plaintiff did not commence any action in the High Court until 2014 even though she knew for more than fifty years that the property was transferred to the deceased. She had stated in her statement of claim that in 1967 she had asked the deceased to transfer the property to her after she had made the payments for five years. However, the deceased 's solicitors refused to do so.

[22] By a letter dated 18 October 1978 the plaintiff, through her solicitors had reiterated that the property belongs to her:

> Our client states that the abovementioned premises belongs to her and the title to that property was deposited with your client to secure her trading debt amounting to RM10,000 owing to your client. The arrangement reached was that our client could redeem the property anytime provided she paid the sum of $100 per month as interest on the debt. Your client had, however procure a Transfer of the property in his favour ...

[23] Despite sending the aforesaid notice and the failure by the deceased to return the property to her, the plaintiff did not take any steps and/or commence any action against the deceased.

[24] Yuen Heng Phong ('SP2'), the plaintiff's son and the administrator for her estate affirmed in his statutory declaration dated 28 June 2000 that his mother, the plaintiff, was fully aware that she was tricked by the deceased since 1962. However, police report was filed in 1998 in the midst of the trial in the sessions court. SP2 further stated in his witness statement that the plaintiff had been informed by her friend, one Lim Tuck Seng, in December 1962 that the property was sold. Yet the plaintiff did not take any action but she continued paying RM130 per month until 1979 to the deceased.

[25] It is the submission of learned counsel for the defendants that since the claim of the plaintiff is based on forgery, the recovery of land under s 340 of the NLC the plaintiff's claim is barred by limitation and as such any action must be commenced within 12 years from the date on which the right of action accrued. The plaintiff's cause of action would have been in accrued when she realised the property was not transferred to her but to the deceased. She knew of this in 1962, in 1978, in 1985 and in 1998. For reason/s only known to the plaintiff, she did not file any action for the recovery of the property at the earliest date possible. Learned counsel finds support in that contention in the pronouncement of the Federal Court in the case of *Zung Zang Wood Products Sdn Bhd & Ors v Kwan Chee Hang Sdn Bhd & Ors* [2014] 2 MLJ 799.

[26] Learned counsel for the plaintiff, however, in response, argued that the claim of the plaintiff is based on constructive trust. The deceased had acquired the ownership of the property through the indenture which had the forged signature of the plaintiff. Therefore, by acquiring the ownership through forgery, a constructive trust is imposed in equity against the deceased. Thus, no period of limitation for recovery of the trust property by virtue of s 22 of the Limitation Act 1953. Learned counsel cited the case of *Malaysian Assurance Alliance Bhd v Anthony Kulanthai Marie Joseph (suing as a representative of the estate of Martin Raj a/l Anthony Selvaraj, deceased)* [2010] 4 MLJ 749; [2011] 1 CLJ 15 where it was held by the Federal Court that limitation does not apply to recovery of property based on constructive trust.

[27] Having perused through the grounds of judgment of the learned judicial commissioner, we noted that he had not dealt with the issue of limitation in much detail. We could only venture to surmise that he had taken that approach that since the plaintiff had succeeded in establishing forgery, limitation and/or laches does not apply with respect in our judgment, the learned judicial commissioner had misdirected himself in fact and in law when he concluded that laches did not apply to this case.

[28] On the facts and evidence, the plaintiff was aware of the transfer of the property by the deceased:

(a) in 1967, she had asked the deceased to transfer Lot 356 to her after she had made the payments for five years;

(b) SP2 affirmed in his statutory declaration dated 28 June 2000 that his mother, the plaintiff, was fully aware that she was tricked by Tung Leong Geok since 1962;

(c) SP2 had stated in his witness statement that the plaintiff had been informed by her friend, one Lim Tuck Seng, in December 1962 that Lot 356 was sold. However, the plaintiff continued paying RM130 per month until 1979;

(d) in 1978, her solicitors had written to the deceased on the issue of transfer of Lot 356 and that Lot 356 belongs to her;

(e) the 1985 the civil suit commenced by the defendants for arrears of rental; and

(f) in 1998, she filed a police report of the fraudulently transfer of Lot 356.

[29] Now, s 9(1) of the Limitation Act 1953 provides:

> No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person.

[30] Section 10(1) of the same Act provides:

> Where the person bringing an action to recover land or some person through whom he claims has been in possession thereof and has, whilst entitled thereto, been dispossessed or discontinued his possession, the right of action shall be deemed to have accrued on the date of the dispossession or discontinuance.

[31] For recovery of property, the question that needed to be asked is when did the right of action accrued. The plaintiff's own witness, SP2, had stated that the plaintiff knew of the transfer way back in 1962 but only filed a police report much later in 1998 after the commencement of the 1985 suit in the sessions court. No explanation was given as to the delay in lodging the police report as well as the caveat. The plaintiff filed this action in 2014, more than twelve years from the date on which the right of action accrued.

[32] Section 29 of the Act further provides that if the action is based upon the fraud the period of limitation shall not begin to run until the plaintiff discovered the fraud or could with reasonable diligence have discovered the fraud:

> Where, in the case of any action for which a period of limitation is prescribed by this Act, either —
>
> (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or
>
> (b) the right of action is concealed by the fraud of any such person as aforesaid; or
>
> (c) the action is for relief from the consequences of a mistake,
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:

[33] We observe that the cause of action available to the plaintiff arose upon her discovery of the fraud. The plaintiff had knowledge of the transfer way back in 1962. This fact was confirmed by SP2 in his statutory declaration dated 28 June 2000 as well in his witness statement that the cause of action arose more than fifty years ago. In our judgment, the failure of the plaintiff to commence any action upon the discovery of the purported fraud against the deceased her claim is therefore statute-barred by the provisions of the said Act.

LACHES

[34] The defendants had also complained that the reliefs sought by the plaintiff could not be realised due to laches, acquiescence and delay arising from inaction by the plaintiff herself for the recovery of the property. In respect of laches, it was submitted by learned counsel for the defendants that the

plaintiff filed her claim years after she knew of the transfer. All material witnesses to the transaction namely, Tung Leong Geok, Lim Tuck Seng, the deceased as well as the plaintiff have since passed away. Thus, due to the inaction by the plaintiff' herself, her claim is barred not only under the Limitation Act 1953 but also due to laches.

[35] Learned counsel for the plaintiff argued that since the ownership was obtained by fraudulently means, the defendants should not be entitled to avail themselves of this equitable defence.

[36] The learned judicial commissioner stated in his grounds of judgment that whether or not the doctrine of laches applies is dependent on whether the defendant had acquired his title by way of fraud (see: para 5; p 26 of the grounds of judgment). His Lordship then evaluated the evidence of forgery and concluded that laches cannot be applied in this case. We reproduce the trial judge's appreciation and findings on this issue:

> [70] ... I undertook the comparison outlined above in relation to the key salient aspects of the questioned signature and the specimen signatures. Having done so, I concluded that the specimen signatures and the questioned signature possessed distinct and distinctive differences in their characteristics. They did not appear to have authored by the same person.
>
> [71] In my view of findings of forgery, it is my considered view that laches is not and cannot be an answer to a claim premised on forgery, more so when the forgery is proven. Forgery cannot be waived or absolved (see the case of *Maziah bt Musa v Zainulabidin bin Mat Akhir, Dato' & Ors* [2014] MLJU 1828; [2014] 1 LNS 641).

[37] For laches to be raised, there must be delay amounting to acquiescence (see: *Cheah Kim Tong & Anor v Taro Kaur* [1989] 3 MLJ 252; [1989] 1 CLJ Rep 378; [1989] 2 CLJ 791; *Foo Holdings Sdn Bhd & Anor v Foo Choon Ying @ Foo Chun Yin (executor for the estate of Chen Choi Thai,the deceased)* [2013] MLJU 1638; [2013] 1 LNS 908; *Archibald v Scully* [1861] IX HLC 360). The doctrine of laches is based on the maxim that 'equity aids the vigilant and not those who slumber on their rights'. Lord Selborne succinctly explained in the landmark case of *Lindsay Petroleum Co Hurd* (1874) LR 5 PC 221:

> But in every case if an argument against relief which otherwise would be just is founded on mere delay, that delay of course not amounting to a bar by any Statute of Limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay, and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other so far as relates to the remedy.

[38] Edgar Joseph Jr J in the case of *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202; [1989] 1 CLJ 693 explained the

doctrine of laches:

> Laches is an equitable defence implying lapse of time and delay in prosecuting a claim. A court of equity refuses its aid to a stale demand where the plaintiff has slept upon his rights and acquiesced for a great length of time. He is then said to be barred by laches. In determining whether there has been such a delay as to amount to laches the court considers whether there has been acquiescence on the plaintiff's part and any change of position that has occurred on the part of the defendant. The doctrine of laches rests on the consideration that it is unjust to give a plaintiff a remedy where he has by his conduct done that which might fairly be regarded as equivalent to a waiver of it or where by his conduct and neglect he has, though not waiving the remedy, put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted: *14 Halsbury's Laws of England* (3rd Ed) paras 1181–1182. Laches has been succinctly described as 'inaction with one eye's open.

[39] The doctrine of laches is based on the Latin maxim *vigilantibus non dormientibus jura subveniunt* (the law serves the vigilant, not those who sleep). It is a defence of an equitable claim based on the length of time the plaintiff has allowed to lapse before commencing proceedings. Similarly, in the appeal before us, we are of the considered view that His Lordship erred when he failed to give due consideration to the fact that the plaintiff had slept upon her alleged rights and interest over the property, if any, and had not taken any steps upon the discovery of the alleged forgery only deciding to commence this action in 2014. No reason was given for the delay in commencing action, an inaction with one eye's open so to speak.

[40] When fraud is relied, it must be sufficiently alleged in the pleading to bring the case within the appropriate statutory provision (*Halsbury's Laws of England* (5th Ed, Vol 68) para 948; (see also *Halsbury's Laws of Malaysia* (2006) Reissue Vol 21 para 510.041). The plaintiff failed to state in her pleadings how she was kept from the knowledge of the transfer and the fraud, if at all. It is necessary that there must be something said or done which was the reason to keep the plaintiff from the knowledge of her right to sue.

[41] In *Abdul Manaf bin Ahmad v Mohd Kamil Datuk Haji Mohd Kassim* [2011] 4 MLJ 346; [2009] 2 CLJ 121Gopal Sri Ram JCA, (as he then was), held:

> Rustomji on the *Law of Limitation and Adverse Possession* (7th Edn), a leading work on the subject, has this comment to make (at p 306 of the text) on the Indian equipollent of s 18 (viz s 17 of the Limitation Act 1963):
>
> > There must be some affirmative act designed to prevent, and which does prevent, the discovery of the cause of action. Mere silence or passiveness (there being no fiduciary relation or act of the party calculated to deceive or lull inquiries) is not fraudulent concealment.

[42] Applying that to the present case, we find that there was no affirmative act on the part of the defendants '... to deceive or lull ...' the plaintiff from taking any action making inquiries into the facts relevant to her right to bring an action. It is clear to us that the plaintiff had slept upon her rights and acquiesced for a great length of time, that is, for more than fifty years. Thus, in the light of overwhelming evidence the plaintiff by reason of the inordinate delay and by her own conduct, in our judgment the claim of the plaintiff, is without a doubt, barred by laches.

FORGERY/FRAUD

[43] Learned counsel for the defendants had also argued that the trial judge did not address the issue of the lack of particulars of fraud and/or forgery. The plaintiff failed to particularise the fraud or forgery in the pleadings. The plaintiff had only pleaded the issue of fraud in para 28 of the statement of claim:

> Plaintif memplidkan bahawa Hartanah tersebut adalah diperolehi oleh Si Mati melalui penipuan dan hakmilik yang diperolehi oleh Si Mati adalah boleh disangkal di bawah Seksyen 340(2) Kanun Tanah Negara 1965.

[44] No other particulars of the alleged forgery and/or fraud were pleaded. Learned counsel submitted that allegation of forgery and/or fraud must be sufficiently particularised in the pleadings. Such allegation cannot be inferred from the facts of the case.

[45] This court in *Wong Yew Kwan v Wong Yu Ke & Anor* [2009] 2 MLJ 672; [2010] 2 CLJ 703 stated the following:

> Order 18 r 7(1) of the Rules requires a party to state the pleadings in the form of skeletal statement of facts sufficient to identify the matters complained of to enable one to establish one's case at the trial based on what is pleaded. To satisfy the rule on pleadings, the appellant was accordingly required to plead 'material facts' necessary for his defence and counterclaim. On the issue of fraud, O 18 r 8(1) of the Rules requires fraud to be specifically pleaded. There is good reason for doing so. It is so as not to take the other party by surprise. In *Associated Leisure Ltd & Ors v Associated Newspapers Ltd* [1970] 2 QB 450 Lord Denning said:
>
> > ... it is the duty of counsel not to put a plea of fraud on the record unless he has clear and sufficient evidence to support it.
>
> On the non-particularisation of fraud, the Federal Court in *Tan Chwee Geok v Khaw Yen-Yen & Anor* [1975] 2 MLJ 188; [1975] 1 LNS 178 at p 191 ruled that:
>
> > Before a plea of fraud is put on record, it is the duty of counsel to insist on being fully instructed in the matter. Such a plea should never be pleaded on flimsy material.

[46] Gopal Sri Ram JCA in *Wong Yew Kwan* referred to the case of *Wallingford v Mutual Society* (1880) 5 App Cas 685 where Lord Hatherley said:

> There is the question of fraud upon which I said I should touch in one moment. Now I take it to be as settled as anything well can be by repeated decisions, that the mere averment of fraud, in general terms, is not sufficient for any practical purpose in the defence of a suit. Fraud may be alleged in the largest and most sweeping terms imaginable. What you have to do is, if it be matter of account, to point out a specific error, and bring evidence of that error, and establish it by that evidence. Nobody can be expected to meet a case, and still less to dispose of a case, summarily upon mere allegations of fraud without any definite character being given to those charges by stating the facts upon which they rest.

[47] The Federal Court's case of *Zung Zang Wood products* is also of relevance where it states:

> 'In relation to pleadings in general, the rules of court require a pleading of fraud to contain particulars of the fraud on which the party pleading relies (see O 18 r 12(1)(a) of the Rules of the High Court 1980, now Rules of Court 2012). When fraud is alleged it must be specifically pleaded. The mere allegation of fraud without showing facts to support it is not a matter to which the court will pay serious attention (*Wallingford v Mutual Society and Official Liquidator* (1880) 5 App Cas 685 at p 697. The party need not use the word 'fraud' if he pleads, in unambiguous language, acts which amount in law to fraud (*Myddleton v Lord Kenyon* (1794) 2 Ves 391 at p 412). Whenever *fraud or misrepresentation is alleged in a pleading, or any affidavit, full particulars of the alleged fraud or misrepresentation must be given' (Spencer Bower, Turner and Handley, Actionable Misrepresentation, (4th Ed), at pp 384–385).*

[48] It is trite law that particulars of fraud must not only be pleaded, but must be specifically pleaded. Fraud must be specifically pleaded so that the other party will not be taken by surprise and will know precisely the accusation against him. Lord Denning MR in *Associated Leisure Ltd (Phonographic Equipment Ltd) v Associated Newspapers Ltd* [1970] 2 QB 450 said that:

> it is the duty of the counsel not to put a plea of fraud on the record unless he has clear and sufficient evidence to support it.

[49] A general allegation of fraud is insufficient to mount the averment of fraud. In our judgment, para 28 of the statement of claim as pleaded is clearly insufficient on the issue of forgery and/or fraud. Unfortunately, the issue of lack of particulars in the pleadings was not addressed and considered by the learned judicial commissioner in his grounds of judgment. The non-particularisation of the allegation of fraud by the plaintiff in this case was clearly fatal.

[50] The standard of proof for forgery is on a balance of probability and the burden is on the person making the assertion. The trial judge accepted and considered the expert evidence of SP1 and concluded that the specimen signatures and the questioned signatures possessed distinct and distinctive differences in their characteristics, and did not appear to have been authored by the same person.

[51] Learned counsel for the defendants submitted that learned judicial commissioner erred as he failed to test the plaintiff's claim of forgery against the chronology of events and contemporaneous documents — the claim of forgery is a non-starter as the plaintiff admitted signing the indenture. On 11 October 1978, the deceased through his solicitors had written a letter to the plaintiff to inform her of an offer to sell the property at the price of RM50,000. The plaintiff in response through her solicitors had stated that her title to the property was deposited with the deceased to secure her trading debt of RM10,000 and that it was agreed that she can redeem the property anytime provided she pays RM100 as interest on the said debt.

[52] In the present suit, it is the plaintiff's case that she had only found out of the forgery after she had conducted a search at the land office sometime in 2007. This was only based on SP1's evidence and not the plaintiff's herself.

[53] The plaintiff passed away on 24 December 2015. The application for a chemist report was made on 28 June 2016 by SP2.The authorship of the plaintiff's signature is questionable as the expert himself could not ascertain whether the specimen handwriting was that of the plaintiff as he did not verify or check whether the specimen handwriting was indeed by the plaintiff.

[54] No other documents were provided except for the Form 19B (the caveat) which was signed in 2007. The Pendaftar Tanah Daerah Timur Laut and the commissioner of oath who had affirmed the plaintiff's statutory declaration dated 28 June 2000 were not call to testify. It is further argued by learned counsel for the defendants that if the authorship of the specimen signatures could not be confirmed by anyone including SP1, the expert himself, it would be impossible to make a comparison to distinguish the authenticity of the signatures — the authorship of the specimen signatures and that of the questioned signature. The plaintiff failed to fulfil the requirement of the Evidence Act 1950 to ascertain the authorship of the specimens given to the expert. Furthermore, the expert report is only two pages giving no explanation of the method applied and the process of comparison.

[55] Learned counsel for the plaintiff submitted that 15 specimen signatures by the plaintiff were provided for comparison and examination.

The specimen signatures ranged from the year 1959–2015 and the features found in the specimen signatures are consistent. It was further argued that the defendants failed to cross-examine the expert on the method and process, and that there was no challenge put to the expert that his conclusion was wrong. In view of the evidence, learned counsel for the plaintiff argued that the plaintiff has proven on the balance of probabilities that the signature on the indenture was not the signature of the plaintiff.

[56] With respect, we are unable to subscribe to the said arguments. Section 73 of the Evidence Act 1950 provides:

> (1) In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal, admitted or proved to the satisfaction of the court to have been written or made by that person, may be compared by a witness or by the court with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.
>
> (2) The court may direct any person present in court to write any words or figures for the purpose of enabling the court to compare the words or figures so written with any words or figures alleged to have been written by that person.
>
> (3) This section applies also, with any necessary modifications, to finger impressions.

[57] The evidence by a handwriting expert can never be conclusive because it is only opinion evidence. It is trite law that the principal object of expert evidence is merely to assist the court to form its own opinion. The Federal Court in the case of *Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai* [1997] 3 MLJ 61; [1997] 2 CLJ 153 referred to the Supreme Court of India's decision in the case of *Murari Lal s/o Ram Singh v State of Madhya Pradesh* 1980 AIR 531 at p 534 where it was held that:

> ... the science of identification of handwriting is not nearly so perfect and the risk is, therefore, higher. But that is a far cry from doubting the opinion of a handwriting expert as an invariable rule and insisting upon substantial corroboration in every case, howsoever the opinion may be backed by the soundest of reasons. It is hardly fair to an expert to view his opinion with an initial suspicion and to treat him as an inferior sort of witness ... His opinion has to be tested by the acceptability of the reasons given by him. An expert deposes and not decides. His duty is 'to furnish the judge with the necessary scientific criteria for testing the accuracy of his conclusion, so as to enable the judge to form his own independent judgment by the application of these criteria to the facts proved in evidence.

[58] The standard of proof in a case based on an allegation of forgery is on a balance of probabilities, the authority being the Supreme Court case of *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182;

[1993] 2 CLJ 31 where it was held that:

> The standard of proof required in a case of forgery on the facts of such a case as the one before the Court is not that of beyond reasonable doubt, but of a balance of

[59] In the same case the court held that:

> The issue whether a signature on a document has been forged is a question of fact. It is eminently a matter for the trial court to determine after considering the credibility of witnesses it has seen and heard and taking into account expert evidence on the point. Of course, a trial judge is not entitled to abdicate his function by allowing an expert to determine the question ... In a civil case and more so in a criminal case, the evidence of an expert on handwriting unsupported by cogent data showing the process by which he came to his conclusion is not worth the paper on which it is written and any reliance upon such evidence would constitute a serious misdirection warranting interference by an appellate tribunal.

[60] The Federal Court in *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697; [2017] 5 CLJ 418 said that the onus of proof lies on the party that asserts it and not on the party that denies the allegation:

> The rule is that 'the onus of proof of any particular fact lies on the party who alleges it, not on him who denies it; *et incumbit probation qui decit, non qui negat, Actori incibit probation* ... The plaintiff is bound in the first instance, to show a prima facie case, and if he leaves it imperfect, the court will not assist him. Hence the maxim *Potior est condition defendantis*. A plaintiff cannot obviously advantage himself by the weakness of the defence. A plaintiff's case must stand or fall upon the evidence adduced by him. When, however, the defendant, or either litigant party, instead of denying what is alleged against him, relies on some new matter which, if true, is an answer to it, the burden of proof changes sides; and he, in his turn, is bound to show a prima facie case at least and, if he leaves it imperfect, the court will not assist him. *Reus excipendo fit actor* (Woodroffe and Amir Ali, Vol 3 at pp 3190–3191).

[61] Thus, the onus to prove that there was forgery in this instant case lies on the plaintiff. The learned judge critically went through the evidence by making his own observation and assessing the signatures of the plaintiff. On appraisal he found that the signatures were not similar, constant or consistent. In fact, the signatures were subject to variations. The finding of the trial court was that the plaintiff's signature was forged. His Lordship came to this conclusion based on the analysis of SP1 even though there were challenges by the defendants' counsel. The trial judge, however, failed to ask himself a very pertinent question, that is, whether the plaintiff was the author of the specimen signatures provided for examination. The authenticity of the authorship of the specimen signature purportedly by the plaintiff is of utmost important as the specimen signatures form the basis of the comparative analysis by SP1. Except

for SP2's evidence, who could not even remember such a critical event, there were no other cogent evidence to support that the specimen signatures were in fact that of the plaintiff's.

[62] In *Public Prosecutor v Mohamed Kassim bin Yatim* [1977] 1 MLJ 64, Hashim Yeop Sani J had said:

> Evidence of experts can never go beyond an opinion and can never therefore be of absolute certainly. It has always been accepted that evidence especially of handwriting can never be conclusive. But the proper way to assess the evidence in this case would be to see whether the court could act on such evidence if there was corroboration either by direct evidence or circumstantial evidence. It is only with such approach that a proper decision can be arrived at.

[63] We agree that a judge who is not an expert himself should defer to expert opinion unless that evidence is obviously indefensible and is not supported by the basic facts of the case. Where there are conflicting expert opinions, the judge is of course entitled to bring his own judicial appreciation of the matter, and choose one over the other, but where there is only one expert opinion, he should not as a rule reject that opinion outright without judiciously considering whether it is obviously indefensible and unsupported by the basic facts of the case (see: *Majuikan Sdn Bhd v Barclays Bank Plc* [2015] 1 MLJ 171; [2014] 9 CLJ 337).

[64] To establish that the signature on the indenture was not of the plaintiff, comparison by necessity must be made with genuine signatures. How better to arrive at a conclusive finding, if not by comparing the signatures on the questioned documents with the specimen signatures of the plaintiff. What is of concern in this case which the learned judicial commissioner overlooked is the authorship of the specimen signatures — whether the specimen signature is that of the plaintiff. The plaintiff passed away sometime in 2015 before giving evidence. SP2 testified that the specimen signatures ('S14') belongs to his mother and that the plaintiff had given her specimen signature before a lawyer:

Q:	Sign before whom?
A:	It was signed before the lawyer, and in front of me
Q:	When?
A:	Around 2015, 2014, 2015 ...

[65] However, the lawyer who purportedly witnessed the plaintiff signing the specimen signature for examination was not called to testify to support SP2 contention that the signing by the plaintiff actually took place. For some unfathomable reason this was not done. We are, therefore, satisfied that the plaintiff's approach to establish the forgery, by making comparison with S14,

the authorship of which is uncertain and the questioned documents, was a methodology that was totally unacceptable and misguided.

[66] In the absence of verification of the authorship of the specimen signatures, in our judgment the expert evidence as well as the findings of the learned judicial commissioner are seriously flawed as they are indefensible and unsupported by the facts of the case.

CONSTRUCTIVE TRUST

[67] In addressing the issue of constructive trust as alleged by the plaintiff, the learned judicial commissioner found that the deceased is the constructive trustee of the plaintiff:

> [86] On the facts of the case especially on my findings of forgery, I am satisfied that the deceased is the constructive trustee of the plaintiff particularly at the time when the deceased became the registered owner of the property ...
>
> [87] Having regard to the above case laws, the evidence produced before me, I am of the considered view that the plaintiff had proved the case of forgery of the indenture dated 3 August 1962 and that the title acquired by the deceased is therefore defeasible under s 340(2) of the National Land Code and by operation of law, a constructive trust arises in favour of the plaintiff and the deceased is a constructive trustee holding the said property on trust for the plaintiff.

[68] The learned judge applied the case of *Guan Teik Sdn Bhd v Haji Mohd Noor bin Haji Yakob & Ors* [2000] 4 MLJ 433; [2000] 4 CLJ 324 and concluded:

> [87] ... the plaintiff had proved the case of forgery of the indenture dated 3 August 1962 and that the title acquired by the deceased is therefore defeasible under s 340(2) of the National Land Code 1965 and by operation of law, a constructive trust arises in favour of the plaintiff and the deceased is a constructive e trustee holding the said property on trust for the plaintiff ...

[69] Millett LJ in *Paragon Finance plc v D B Thakerar & Co (a firm)* [1999] 1 ALL ER 400 summarised the principles applicable to constructive trust:

> Regrettably, however, the expressions 'constructive trust' and 'constructive trustee' have been used by equity lawyers to describe two entirely different situations. The first covers those cases already mentioned, where the defendant, though not expressly appointed as trustee, has assumed the duties of a trustee by a lawful transaction which was independent of and preceded the breach of trust and is not impeached by the plaintiff. The second covers those cases where the trust obligation arises as a direct consequence of the unlawful transaction which is impeached by the plaintiff.
>
> A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property (usually but not

necessarily the legal estate) to assert his own beneficial interest in the property and deny the beneficial interest of another. In the first class of case, however, the constructive trustee really is a trustee. He does not receive the trust property in his own right but by a transaction by which both parties intend to create a trust from the outset and which is not impugned by the plaintiff. His possession of the property is coloured from the first by the trust and confidence by means of which he obtained it, and his subsequent appropriation of the property to his own use is a breach of that trust ... In these cases the plaintiff does not impugn the transaction by which the defendant obtained control of the property. He alleges that the circumstances in which the defendant obtained control make it unconscionable for him thereafter to assert a beneficial interest in the property.

'The second class of case is different. It arises when the defendant is implicated in a fraud. Equity has always given relief against fraud by making any person sufficiently implicated in the fraud accountable in equity. In such a case he is traditionally though I think unfortunately described as a constructive trustee and said to be 'liable to account as constructive trustee'. Such a person is not in fact a trustee at all, even though he may be liable to account as if he receives the trust property at all it is adversely to the plaintiff by an unlawful transaction which is impugned by the plaintiff. In such a case the expressions 'constructive trust' and constructive trustee' are misleading, for there is no trust and usually no possibility of a proprietary remedy; they are 'nothing more than a formula for equitable relief'.

[70] In the Federal Court case of *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; [2010] 1 CLJ 381 Sri Ram FCJ said:

If a trustee or other fiduciary acquires a property in breach of trust or by means of other unconscionable conduct, he or she holds it on a constructive trust for the true beneficiary.

[71] It was held by the Federal Court in *Takako Sakao* at pp 386–387:

The appellant's claim — a proprietary and not merely monetary claim — against the first respondent was as a beneficiary under a constructive trust ...

A constructive trust is imposed by law irrespective of the intention of the parties. It is imposed only in certain circumstances, such as where: (i) there is a specifically enforceable contract for the sale of property (movable or immovable), the vendor holds the property on a constructive trust for the purchaser; and (ii) a gift made as a donatio mortis causa fails, the intended beneficiary of the gift holds it in trust for the donor. What equity does in those circumstances is to fasten upon the conscience of the holder of the property a trust in favour of another in respect of the whole or a part thereof.

[72] The relevant principles of trust law have been laid down in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 by Lord Browne-Wilkinson at p 705:

(i) Equity operates on the conscience of the owner of the legal interest. In the case of a trust, the conscience of the legal owner requires him to carry out

A the purposes for which the property was vested in him (express or implied trust) or which the law imposes on him by reason of his unconscionable conduct (constructive trust).

(ii) Since the equitable jurisdiction to enforce trusts depends upon the conscience of the holder of the legal interest being affected, he cannot be a trustee of the property if and so long as he is ignorant of the facts alleged to affect his conscience, ie, until he is aware that he is intended to hold the property for the benefit of others in the case of an express or implied trust, or, in the case of a constructive trust, of the factors which are alleged to affect his conscience.

C

(iii) In order to establish a trust there must be identifiable trust property. The only apparent exception to this rule is a constructive trust imposed on a person who dishonestly assists in a breach of trust who may come under fiduciary duties even if he does not receive identifiable trust property.

D

(iv) Once a trust is established, as from the date of its establishment the beneficiary has, in equity, a proprietary interest in the trust property, which proprietary interest will be enforceable in equity against any subsequent holder of the property (whether the original property or substituted property into which it can be traced) other than a purchaser for value of the legal interest without notice.

E

These propositions are fundamental to the law of trusts and I would have thought uncontroversial.

[73] The evidence gleaned from the appeal records shows that the plaintiff F had paid RM130 to the deceased as monthly rental and receipts tor the monthly rentals were issued by the deceased to the plaintiff. No evidence was adduced that the said payment was for the purchase the property.

[74] There was no evidence of the existence of an oral or written agreement G between the plaintiff and the deceased that it was agreed that the deceased would return the property to the plaintiff. Under the circumstances, we have absolutely no hesitation to hold that based on the facts and the evidence, in absence of any proof of forgery, the learned judicial commissioner erred in imputing or imposing a constructive trust.

H

RES JUDICATA

[75] Wigram VC, in the case of *Henderson v Henderson* (1843) 3 Hare 100 at p 115 explained:

I

> The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time.

[76] Peh Swee Chin FCJ delivering the judgment of the court in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783 had this to say:

> What is *res judicata*? It simply means a matter adjudged, and its significance lies in its effect of creating an *estoppel per rem judicature*. When a matter between two parties has been adjudicated by a Court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata*, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur*. The public policy of the law is that it is in the public interest that there should be finality in litigation — *interest rei publicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action — *nemo debet bis vexari pro eadem causa*. Both maxims are the rationales for the doctrine of *res judicata*, but the earlier maxim has the further elevated status of a question of public policy.
>
> Since a *res judicata* creates an estoppel *per rem judicatum*, the doctrine of *res judicata* is really the doctrine of estoppel *per rem judicatum*, the latter being described sometimes in a rather archaic way as estoppel by record. Since the two doctrines are the same, it is no longer of any practical importance to say that *res judicata* is a rule of procedure and that an estoppel *per rem judicatum* is that of evidence. Such dichotomy is apt to give rise to confusion.

[77] Thus, guided by the aforementioned cases, we are of the view that res judicata does not apply for these simple reasons. The sessions court in Civil Suit No 62–1283 of 1985 only decided on arrears of rental and vacant possession. The High Court in the striking out application decided whether the claim is on the face of it obviously unsustainable. The learned judicial commissioner in the striking out application did not decide on the issue of forgery as well as limitation/laches but he found that there is a cause of action and for the matter to proceed to full trial to be decided on viva voce and documentary evidence.

CONCLUSION

[78] In conclusion, after having heard the parties at length and upon careful perusal of the records of appeals, we are of the considered opinion that this is a case in which appellate intervention is warranted.

[79] For the foregoing reasons, we unanimously allowed the appeal in particular prayers (a) and (b) of the counterclaim with costs. We set aside the High Court judgment. As for costs, we awarded a sum of RM28,000 here and below to the appellant to be paid by the respondent subject to allocatur. We also ordered that the deposit be refunded to the appellant. So ordered.

Order accordingly.

Reported by Ashok Kumar